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In the Supreme Court of the United States

OCTOBER TERM, 1991

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether Section 318(b)(6)(A) of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 100-121, Tit. III, § 318(b)(6)(A), 103 Stat. 747 (1989), which provides interim statutory standards not subject to judicial review for management of government forest timber sales that had been challenged in pending federal court actions, violates the constitutional principle of separation of powers.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Pilchuck Audubon Society, Washington Environmental Council, Washington Native Plants Society, Oregon Natural Resources Defense Council, Inc., Portland Audubon Society, Lane County Audubon Society, and Siuslaw Task Force were plaintiffs in the district court (W.D. Wash.) and appellants in the court of appeals. Washington Contractor Loggers Association and William Pickell were also plaintiffs in the district court and appellees in the court of appeals.

Portland Audubon Society, Headwaters, Lane County Audubon Society, Oregon Natural Resources Council, Siskiyou Audubon Society, Central Oregon Audubon Society, Kalmiopsis Audubon Society, Umpqua Valley Audubon Society, and Natural Resources Defense Council were plaintiffs in the district court (D. Or.) and appellants in the court of appeals. Northwest Forest Resource Council, Huffman & Wright Logging Co., Freres Lumber Co., Inc., Lone Rock Timber Co., Inc., Scott Timber Co., Clear Lumber Manufacturing Corp., Yoncalla Timber Products, Inc., Cornett Lumber Company, Inc., Douglas County Forest Products Company, Medford Corporation, Rogge Forest Products, Inc., Association of O & C Counties, and Benton County were defendants/intervenors in the district court and appellees in the court of appeals.

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P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* (3d ed. 1988) 43, 44
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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-17a) is reported at 914 F.2d 1311. The opinion and order of the district court in *Seattle Audubon Society* v. *Robertson*, No. 89-160WD (W.D. Wash) (Pet. App. 20a-28a, 29a-34a) are unreported. The opinion of the district court in *Portland Audubon Society* v. *Lujan*, No. 87-1160-FR (D. Or.) (Pet. App. 35a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1990. Petitions for rehearing were denied on January 16, 1991. Pet. App. 18a-19a. The petition for a writ of certiorari was filed on April 12, 1991, and was granted on June 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 318(b)(6)(A) of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, 103 Stat. 747 (1989), provides:

> Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.

Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, 103 Stat. 745-750 (1989), is reproduced in its entirety at App., *infra*, 1a-13a.[1]

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[1] Section 318 is also reprinted at Pet. App. 43a-55a. The petition appendix, however, contains two printing errors: one line was inadvertently omitted after the first line in Section (b)(3), on Pet.

STATEMENT

This case involves "the ongoing controversy over logging in old growth forests in Oregon and Washington and the impact of that logging on the northern spotted owl." Pet. App. 5a. Old-growth forests are favored natural habitat for the northern spotted owl, *Strix occidentalis caurina*. The bird's current range extends from northern California, through the coastal and cascade regions of Oregon and Washington, and into southern British Columbia. Because of logging and land conversion activities, approximately 90% of suitable habitat for northern spotted owls now occurs on government land.[2] The Forest Service manages 79% of the habitat on federal land, and the Bureau of Land Management manages 14% of it; the remaining 7% is on National Park Service land. Sixty percent of northern spotted owl habitat on federal land is in areas classified as "timber production land." 55 Fed. Reg. 26,114-26,115, 26,175 (1990).

In the late 1980's, respondents—the Seattle Audubon Society, the Portland Audubon Society, and other environmental groups—filed actions in the Western District of Washington and the District of Oregon challenging the federal government's efforts to continue logging old-growth timber in government-owned forests located in the Pacific Northwest. During the pendency of those federal court proceedings, Congress enacted Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. 101-121, Tit. III, 103 Stat. 745-750 (1989), also known as the Northwest Timber Compromise. Section 318 "sets terms and conditions applica-

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App. 45a, and one line was inadvertently omitted after the eleventh line of Section (b)(4), on Pet. App. 46a.

[2] In June 1990, during the pendency of respondents' lawsuits, the United States Fish and Wildlife Service listed the northern spotted owl as a threatened species under the Endangered Species Act, 16 U.S.C. 1531 *et seq.* See 55 Fed. Reg. 26,114 (1990).

ble only for fiscal year 1990 for making timber sales on Federal lands in Oregon and Washington, for managing habitat for northern spotted owls, and for minimizing fragmentation of significant old growth forest stands." H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 87 (1989). Its purpose was to "balance the goals of ensuring a predictable flow of public timber for fiscal year 1990 and protecting the northern spotted owl and significant old growth forest stands." *Ibid.*

The district courts in Oregon and Washington concluded that Section 318 operated as a "temporary modification of the environmental laws" invoked by respondents in their lawsuits. Pet. App. 25a; see also *id.* at 37a-38a. Accordingly, the district courts determined that the statute by its terms precluded respondents' claims for relief.

The Ninth Circuit reversed, holding that one part of Section 318—the first sentence in Section 318(b)(6)(A)—violates the constitutional principle of separation of powers set forth in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). The court of appeals determined that Section 318(b)(6)(A) "does not establish new law, but directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court." Pet. App. 14a. In the court's view, "[t]his is what *Klein* and subsequent cases agree is constitutionally proscribed." *Ibid.* The court of appeals thus remanded the cases to the district courts for consideration of the merits of respondents' challenges.

A. Initial Proceedings In The District Courts and Court of Appeals

1. *Portland Audubon Society* v. *Lujan*

The Bureau of Land Management (BLM), an agency of the Department of the Interior, manages approximately 2.4 million acres of forested land in Oregon. 55

Fed. Reg. 26,189 (1990). Most of these lands are revested Oregon and California Railroad (O & C) grant lands that are administered pursuant to the Oregon and California Lands Act (OCLA), 43 U.S.C. 1181a.[3] The remainder is interspersed, never-patented public domain lands administered pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*

Between 1979 and 1983, the BLM completed seven separate timber management plans and environmental impact statements to govern timber harvesting on BLM lands, for the next decade, in seven specified areas of western Oregon.[4] Under these documents, habitat for a total of 66 to 85 pairs of the northern spotted owl was to be protected. GXs 122-128. By agreements between the Oregon Department of Fish and Wildlife and the BLM, the number of protected pairs was raised to 90 in 1983, and to 110 in 1987. GXs 129, 138.

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[3] The saga of the O & C lands is told in *Oregon & Cal. R.R.* v. *United States*, 238 U.S. 393 (1915). See also *Oregon & Cal. R.R.* v. *United States*, 243 U.S. 549 (1917). Briefly, between 1866 and 1870, Congress made a series of grants of alternate sections of land along the right of way of a railroad to be built between Portland and the California border. A proviso to the land grants required that the lands be sold to actual settlers in amounts not to exceed 160 acres at a price not to exceed $2.50 an acre. After 1894, however, the railroad disposed of some of the land in violation of the proviso; the United States sued to enforce the proviso or forfeit the lands. Ultimately, Congress enacted the Chamberlain-Ferris Revestment Act of June 9, 1916, ch. 137, 39 Stat. 218, which revested unsold lands in the United States, and provided compensation to the railroad.

The term "O & C lands" also encompasses Coos Bay Wagon Road lands reconveyed by the Southern Oregon Company to the United States pursuant to the Act of Feb. 26, 1919, ch. 47, 40 Stat. 1179. See *Southern Oregon Co.* v. *United States*, 249 U.S. 589 (1919).

[4] The BLM lands in western Oregon are divided into five administrative districts. Seven timber management plans and EIS's were prepared because two districts are subdivided into two subareas.

In 1986, BLM commenced preparing replacement plans, called Resource Management Plans, which were then scheduled for completion in 1990. GX 114.[5] In 1987, the Oregon State office of the BLM—an administrative unit within the BLM—prepared an environmental assessment to determine whether significant new information concerning the northern spotted owl had developed since the preparation of the seven timber management plans. GX 125. On April 10, 1987, that office issued a notice stating that BLM would not supplement the prior environmental impact statements; the agency concluded that new information was not significant, and that options for the protection of the northern spotted owl would be available at the time of the expected completion of the new plans. GX 136.

In October 1987, Portland Audubon Society and other environmental groups (hereafter the Portland Audubon respondents) filed a complaint for declaratory and permanent injunctive relief challenging BLM's decision not to prepare a supplement to the environmental impact statements for the timber management plans adopted in the period 1979-1983. J.A. 42-56. The complaint alleged violations of four federal statutes: (1) the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*; (2) the Oregon and California Lands Act (OCLA), 43 U.S.C. 1181a; (3) the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*; and (4) the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 *et seq.* On each of these four counts, the Portland Audubon respondents alleged that their cause of action rested upon the provisions of the Administrative Procedure Act (APA) for judicial review of agency action, 5 U.S.C. 702, 706(2)(A). J.A. 53-54.

In April 1988, the district court dismissed the action, holding that Section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1988,

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[5] These plans are still in preparation.

Pub. L. No. 100-202, Tit. III, 101 Stat. 1329-254 (1987), precluded judicial review of Portland Audubon's claims.[6] In January 1989, however, after granting injunctions pending appeal, the court of appeals reversed and remanded for further proceedings. *Portland Audubon Society* v. *Hodel*, 866 F.2d 302 (9th Cir.), cert. denied, 492 U.S. 911 (1989).[7]

On remand, in May 1989, the district court again dismissed the Portland Audubon respondents' action on the basis of the statutory bar in Section 314. *Portland Audubon Society* v. *Lujan*, 712 F. Supp. 1456 (D. Or. 1989). The court of appeals again enjoined BLM timber sales pending appeal. In September 1989, the appellate court affirmed the district court's dismissal of respondents' NEPA claim, but reversed and remanded the dismissal of respondents' claims under the OCLA, FLPMA and MBTA. *Portland Audubon Society* v. *Lujan*, 884 F.2d 1233 (9th Cir. 1989), cert. denied, 494 U.S. 1026 (1990).[8]

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[6] In pertinent part, Section 314 provided that

> there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further*, That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

101 Stat. 1329-254.

Congress later reenacted that express provision. See Department of the Interior and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-446, Tit. III, § 314, 102 Stat. 1825-1826 (1988); Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, § 312, 103 Stat. 743 (1989). The validity and effect of that provision are not at issue here, but are at issue in a pending Ninth Circuit appeal. *Portland Audubon Society* v. *Lujan*, No. 91-35802.

[7] The court of appeals also vacated the previously entered stay "without prejudice to any appropriate renewed efforts by [respondents] to obtain such temporary remedies, if any, as the district court may deem necessary and proper." 866 F.2d at 309-310.

[8] Upon issuance of its final decision, the court vacated the stay that it had granted pending appeal. 884 F.2d at 1234, 1242.

2. *Seattle Audubon Society* v. *Robertson*

Region 6 of the United States Forest Service, Department of Agriculture, covers the States of Oregon and Washington. It contains 19 national forests, 13 of which are known to contain the northern spotted owl.

In 1976, Congress enacted the National Forest Management Act (NFMA), 16 U.S.C. 1601 *et seq.* That Act sets forth procedures, criteria, and guidelines for the development of land management plans for National Forest System units. In implementing NFMA, the Forest Service promulgated regulations calling for the development of regional guides. 36 C.F.R. 219.8(a). Regional guides "provide standards and guidelines for addressing major issues and management concerns which need to be considered at the regional level to facilitate forest planning." *Ibid.*

In 1984, Region 6 completed its regional guide which, *inter alia*, addressed habitat requirements for the northern spotted owl. J.A. 65. In 1985, on administrative appeal, the Department of Agriculture remanded the northern spotted owl portion of the regional guide to the Forest Service for reconsideration. J.A. 65. The Forest Service prepared a supplemental environmental impact statement and, in December 1988, issued a Record of Decision adopting an amendment to the regional guide. J.A. 67. That amendment called for the creation of Spotted Owl Habitat Areas (SOHAs) around northern spotted owl pairs or individuals and in empty spotted owl habitat. The SOHAs were to range in size from 1000 acres in the more southerly Klamath Mountain Province (Siskiyou National Forest) to 3000 acres in the northwestern Olympic Peninsula Province (Olympic National Forest). J.A. 79-80. Other standards and guidelines prescribed criteria for SOHA selection and spacing of the SOHAs. J.A. 81-87.

In February 1989, Seattle Audubon Society and other environmental groups (hereafter the Seattle Audubon respondents) filed suit against the Chief of the Forest

Service in the United States District Court for the Western District of Washington. The Seattle Audubon respondents claimed that the Forest Service's plan for managing the northern spotted owl habitat in Region 6 national forests violated NEPA, the MBTA, and the NFMA. J.A. 74-75.[9] They sought declaratory and injunctive relief, barring the Forest Service from implementing its plans. Pet. App. 6a, 30a-32a. In a series of rulings issued in the spring of 1989, the district court preliminarily enjoined 163 timber sales in Washington and Oregon. Those sales each involved areas of 40 acres or more of suitable spotted owl habitat. *Id.* at 6a, 30a-33a.

B. Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990

In the midst of the disruption caused by the injunctions issued in the course of respondents' lawsuits, Congress enacted Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 100-121, Tit. III, 103 Stat. 745-750 (1989), in order to "balance the goals of ensuring a predictable flow of public timber for fiscal year 1990 and protecting the northern spotted owl and significant old growth forest stands." H.R. Conf. Rep. No. 264, *supra*, at 87. Consequently, as effective October 23, 1989, Section 318 "sets terms and conditions applicable only for fiscal year 1990 for making timber sales on Federal lands in Oregon and Washington, and for minimizing fragmentation of significant old growth forest stands." *Ibid.*

1. Section 318(a) sets the amount of timber sales. It provides that the Forest Service shall offer "an aggregate timber sale level of seven billion seven hundred million board feet" of "net merchantable timber" from the

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[9] The Washington Contract Loggers Association filed a similarly based action against the Forest Service, "challenging the [Service's] guidelines as overly restricting timber harvesting." Pet. App. 6a. The district court consolidated that action with the Seattle Audubon respondents' lawsuit. *Id.* at 31a.

national forests of Oregon and Washington for fiscal years 1989 and 1990. § 318(a)(1). Of that total, "an aggregate timber sale level for fiscal years 1989 and 1990 of five billion eight hundred million board feet" must come from "the thirteen national forests in Oregon and Washington known to contain northern spotted owls." *Ibid.* The legislation further provides that BLM shall offer "an aggregate timber sale level of one billion nine hundred million board feet for fiscal years 1989 and 1990 from its administrative districts in western Oregon." § 318(a)(2).

2. Section 318(b) then prescribes standards for the timber sales. Sections 318(b)(1), 318(b)(2), and 318(b)(4) require the Forest Service to minimize fragmentation of ecologically significant old-growth forest stands in planning timber sales. Section 318(b)(3) forbids Forest Service timber sales within Spotted Owl Habitat Areas (SOHAs) pursuant to the regional guide, and expands the areas of SOHAs in each geographic province.[10] Aside from these modifications, "[a]ll other standards and guidelines contained in the [Forest Service] Chief's Record of Decision are adopted." § 318(b)(3)(F). With regard to the BLM, Section 318(b)(5) forbids timber sales in the 110 areas designated for northern spotted owl protection in the December 1987 agreement between the BLM and the Oregon Department of Fish and Wildlife. Section 318(b)(5) also directs the BLM to identify, through consultation with state and federal agencies, 12 additional spotted owl habitat areas, and forbids timber sales in those additional areas.

Section 318(b)(6)(A), in turn, addresses the applicability of certain statutes. The Section begins by stating that Congress is not "passing on the legal and factual adequacy of" the Forest Service's Environmental Impact

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[10] For example, the SOHA size for the Klamath Mountain Province was expanded from 1000 acres to 1250 acres; the size for the Olympic Peninsula Province from 3000 acres to 3200 acres. See § 318(b)(3); J.A. 79, 80.

Statement and Record of Decision and BLM's agreement with the Oregon Department of Fish and Wildlife. It then relates that "the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for" the *Portland Audubon* and *Seattle Audubon* cases. The subsection then adds that "[t]he guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States." App., *infra*, 5a-6a.

3. In order to protect the 1990 timber sale programs from litigation disruptions, Section 318(g) provides streamlined judicial review procedures. The provision provides for expedited judicial review of individual timber sale decisions by suits filed within fifteen days of the initial advertisement of the sale. It prohibits federal courts from issuing a "restraining order or preliminary injunction * * * with respect to any decision * * * [regarding] timber sales in fiscal year 1990 from the thirteen national forests in Oregon and Washington and [BLM] lands in western Oregon known to contain northern spotted owls." § 318(g)(1). It nevertheless specifically authorizes courts "to enjoin permanently * * * an individual sale" after a determination on the merits that the sale decision was "arbitrary, capricious or otherwise not in accordance with law." *Ibid.*[11]

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[11] In addition to Sections 318(a), (b), and (g), Section 318 contains eight other provisions. Sections 318(c), (d), (e), and (h) further elaborate on the required procedures, and Sections 318 (i), (j), and (k) clarify the effect of various parts of the legislation. Section 318(f) specifically addresses the Seattle Audubon litigation. It orders that timber sales aggregating 1.1 billion board feet from the sales subject to the injunction in the *Seattle Audubon* case be offered notwithstanding the provisions of law that formed the basis for the preliminary injunction entered in the case. § 318(f)(3). It

C. District Court Proceedings In Light of Section 318

1. *Seattle Audubon Society* v. *Robertson*

As a result of the express provisions of Section 318, the government in October 1989 asked the district court to vacate the preliminary injunction it had previously entered barring the 163 planned timber sales in Washington and Oregon. The Seattle Audubon respondents countered that Section 318(b)(6)(A) was unconstitutional, contending that Congress impermissibly directed the result in pending actions and otherwise unlawfully barred judicial review of the one-year guidelines established by the statute. Pet. App. 23a.

In November 1989, the district court granted the government's motion, rejected the Seattle Audubon respondents' constitutional challenge, and vacated the preliminary injunction. Pet. App. 20a-28a, 29a-34a. The court concluded that Section 318(b)(6)(A) "does not require a particular decision on the issues of this case." Pet. App. 24a. On the contrary, the court determined, "Congress has adopted the Forest Service's proposed guidelines, challenged by [respondents], as statutory law for a period of one year." *Ibid.* Congress has "the power to do this," the court recognized, since "[j]ust as Congress may create a geographic exception to the environmental laws, it may also create a temporal exception." *Ibid.* The court also rejected the Seattle Audubon respondents' contention that the statute's bar to judicial review was unconstitutional, noting that Congress may restrict federal court jurisdiction, and that Section 318(b)(6)(A) "means only that, as new statutory law, the guidelines [mandated in subsections (b)(3) and (b)(5)] cannot be tested in court for compliance with the National Forest Management

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also specifies a procedure in which the Seattle Audubon respondents would be permitted to participate in selecting, from a list submitted by the Forest Service, certain sales and prohibiting other sales; such sales would not be subject to judicial review. § 318(f)(1) and (2).

Act, the National Environmental Policy Act, or other general environmental statutes." Pet. App. 25a-26a.[12]

2. *Portland Audubon Society* v. *Lujan*

In the district court, the government similarly sought to dismiss the Portland Audubon respondents' pending claims in view of newly enacted Section 318. Respondents contended that Section 318(b)(6)(A), which in their view prescribed a rule of decision in the pending action, violated the constitutional principle of separation of powers. Pet. App. 37a.

In December 1989, the district court granted the government's motion and dismissed respondents' statutory claims as moot, without prejudice to refiling after the end of fiscal year 1990. Pet. App. 35a-42a. The court rejected respondents' constitutional challenge, adopting the "reasoning and result" of the district court in the *Seattle Audubon Society* case. *Id.* at 37a.[13]

D. The Court of Appeals Decision

In September 1990, the court of appeals reversed, holding that Section 318(b)(6)(A) violates the constitutional principle of separation of powers. Pet. App. 1a-17a. Relying principally on *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), and *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980), the court stated that the

> critical distinction, for purposes of deciding the limits to Congress' authority to affect pending litigation through statute, is between the repeal or amendment of the law underlying the litigation,

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[12] In January 1990, the district court certified respondents' constitutional challenge to Section 318(b)(6)(A) for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. 8a; J.A. 19.

[13] The Portland Audubon respondents noted an appeal from the district court's final judgment dismissing their action. The court of appeals later consolidated the *Seattle Audubon* and *Portland Audubon* appeals. Pet. App. 5a, 8a.

> which is permissible, and the direction of a particular decision in a case, without repealing or amending the law underlying the litigation, which is not permissible.

Pet. App. 11a-12a.

Turning to Section 318(b)(6)(A), the court determined that the statute "does not, by its plain language, repeal or amend the environmental laws underlying this litigation." Pet. App. 13a. Instead, the court stated, "[t]he clear effect of subsection (b)(6)(A) is to direct [the court] that, if the government follows the plan incorporated in subsections (b)(3) and (b)(5), then the government will have done what is required under the environmental statutes involved in these cases." *Ibid.*

Having construed the statute in this manner, the court concluded that "[i]n this way Congress, through section 318, seeks to perform functions reserved to the courts by Article III of the Constitution." Pet. App. 14a. In other words, Section 318(b)(6)(A) "does not establish new law, but directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in the federal court." *Ibid.* In the court's view, "[t]his is what *Klein* and subsequent cases agree is constitutionally proscribed." *Ibid.*[14]

Finally, the court of appeals noted that "even if [it] could interpret section 318 as a temporary repeal of the environmental laws at issue in the underlying litigation, then section 318 would amount to an implied partial repeal of the environmental statutes." Pet. App. 16a. Relying on *TVA* v. *Hill*, 437 U.S. 153 (1978), and circuit precedent, the court stated that Congress could not partially repeal substantive law in an "appropriations measure." Pet. App. 16a.

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[14] Before denying petitions for rehearing in January 1991, Pet. App. 18a-19a, the panel issued an order amending its opinion in several respects, *id.* at 3a-4a. The opinion reprinted in the petition appendix (*id.* at 4a-17a) incorporates these amendments.

E. District Court Proceedings On Remand From Court of Appeals' Invalidation of Section 318(b)(6)(A)

1. *Seattle Audubon Society* v. *Robertson*

Subsequent to the court of appeals' decision, the Seattle Audubon respondents renewed their objections to 12 Forest Service timber sales. In December 1990, the district court set aside and enjoined those sales for violations of NEPA, NFMA, and the MBTA, *Seattle Audubon Society* v. *Robertson*, No. 89-160WD (W.D. Wash. Dec. 18, 1990), *reprinted at* Br. in Opp. App. 126a-143a, appeal pending, No. 91-35378 (9th Cir).

Respondents also sought to challenge an additional six Forest Service 1990 timber sales. The district court dismissed those challenges as untimely under the fifteen-day limitations period of Section 318(g)(1), 103 Stat. 749. The court of appeals reversed, ruling that the fifteen-day period had been equitably tolled during the period that respondents were challenging the constitutionality of Section 318(b)(6)(A). *Seattle Audubon Society* v. *Robertson*, 931 F.2d 590 (9th Cir. 1991), *reprinted at* Br. in Opp. App. 66a-84a. On remand, the district court enjoined four of the challenged sales; the remaining two sales had been substantially harvested. *Seattle Audubon Society* v. *Evans*, No. 89-160WD (W.D. Wash. May 24, 1991), *reprinted at* Br. in Opp. App. 85a-88a, appeal pending, No. 91-35564 (9th Cir.).[15]

2. *Portland Audubon Society* v. *Lujan*

On remand from the court of appeals, the district court granted partial summary judgment to the government. It found that Portland Audubon's NEPA claim had been

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[15] In their brief in opposition to certiorari, respondents stated that they are not pursuing their challenge to any 1990 Forest Service sales besides the 16 that have been enjoined. See Br. in Opp. 11 n.7. Because Section 318(k) provides that fiscal 1990 sales will be governed by the 1990 Appropriations Act even after fiscal 1990, Section 318 remains pertinent to the 16 sales.

dismissed in 1989, and that its claims under the OCLA and the MBTA were meritless. The district court denied the parties summary judgment on the FLPMA claim, which remains pending. *Portland Audubon Society* v. *Lujan*, No. 87-1160-FR (D. Or. May 8, 1991), *reprinted at* Br. in Opp. App. 88a-104a, appeal pending, No. 91-35762 (9th Cir.).

SUMMARY OF ARGUMENT

1. A cardinal principle of constitutional adjudication is that, if fairly possible, statutes should be construed to avoid constitutional difficulties. See, *e.g.*, *Communications Workers* v. *Beck*, 487 U.S. 735, 762 (1988). Here, the court of appeals rejected an entirely plausible (and, indeed, the most straightforward) reading of Section 318 —that it establishes a temporary modification of legal standards governing the management of designated public lands by specifying the required plans and providing that they should not be impeded by the operation of other environmental statutes.

This congressional intent is plain both from a consideration of Section 318 without regard to the first sentence of Section 318(b)(6)(A) and from a consideration of that sentence itself. As a whole, Section 318 establishes mandatory timber sale levels for fiscal 1990 (§ 318(a)), specifies environmental procedures for those mandatory sales (§ 318(b)), and provides a variety of other timber sales-related procedures (§ 318(c)-(k)). The second sentence of Section 318(b)(6)(A), moreover, provides that there shall be no judicial review of the (b)(3) and (b)(5) guidelines—a directive plainly violated by the court of appeals' ultimate conclusion that the (b)(3) and (b)(5) guidelines may be measured against other environmental statutes to determine their adequacy.

Like Section 318 as a whole, the first sentence of Section 318(b)(6)(A) is perfectly consistent with the understanding that Section 318 is a temporary modification of environmental laws, providing the procedures to govern federal land management in the designated area for one

year without impediment from other environmental statutes. The court of appeals' conclusion to the contrary rests on several misconceptions. These include a misapprehension about the significance of the statutory reference to these cases, an overly simplistic dichotomy regarding possible congressional actions that fails to take into account "deeming" provisions and conclusive presumptions, an erroneous conclusion that the statute requires the entry of judgment and findings, and a mistaken assumption that the first sentence must be interpreted as a directive to the courts, rather than to executive agencies.

Finally, the court of appeals' ultimate interpretation—in which the specified standards simply apply in addition to the other, pre-existing statutory requirements—is plainly contrary to Congress's intent in fashioning a one-year compromise to streamline timber sales and avert a looming crisis. The court's interpretation severely distorts the nature and effect of that compromise.

2. In addition to misreading the statute, the court misconstrued Article III and *United States* v. *Klein*. Article III plays a limited role in restraining Congress's ability to enact legislation that affects pending cases. Numerous constitutional provisions—the Due Process Clause, the equal protection component of that Clause, the Takings Clause, and the Bill of Attainder and Ex Post Facto Clauses—address aspects of this issue, and Article III does not function as a general backstop to these provisions. Instead, Article III performs an important, but limited, mission of protecting the adjudicative function.

Contrary to the court of appeals' conclusion, the first sentence of Section 318(b)(6)(A) presents no invasion of the adjudicative function. The sentence provides, at most, a legal characterization, operating as a deeming provision or conclusive presumption. Such congressionally specified legal characterizations are merely a form of prescribing governing substantive legal standards—a legis-

lative function that does not impinge on the adjudicative function. Because Congress's expressed objective—that the (b)(3) and (b)(5) guidelines would operate unimpeded by other environmental statutes—is constitutional, Congress's choice of language in expressing that permissible objective should not determine its constitutional validity. Cf. *United States* v. *Ptasynski*, 462 U.S. 74, 86 (1983). Because Congress was providing the standards for management of the public lands, moreover, its authority was especially broad, see Art. IV, § 3, Cl. 2; *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 580 (1987). Indeed, the court of appeals impermissibly intruded on the congressional responsibility for the management of public lands.

United States v. *Klein* does not require a different conclusion. *Klein* is distinguishable from the instant case in several important respects. Unlike *Klein*, this case presents no issue concerning vested property rights, no issue concerning an unconstitutional objective by Congress, and no issue concerning manipulation of jurisdiction to achieve an unconstitutional objective. Although *Klein* contains some broad and ambiguous language, the decision should, consistent with established principles of constitutional interpretation, be given a careful reading, appropriately limited by the issues presented in the case itself. *Klein* clearly establishes that Congress may not impinge upon the pardon power; that, in certain circumstances, there may be judicial review of limitations on this Court's jurisdiction; and that Congress may not manipulate this Court's appellate jurisdiction in such a manner that the Court becomes the means through which Congress unconstitutionally infringes on the pardon power. *Klein* does not, however, require invalidation of Congress's temporary modification, in Section 318, of the standards governing the management of designated public lands.

ARGUMENT

I. THE COURT OF APPEALS MISCONSTRUED SECTION 318

It is a fundamental principle of constitutional adjudication that "federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and that when faced with such doubts the Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Communications Workers* v. *Beck*, 487 U.S. 735, 762 (1988). This Court has repeatedly reiterated this requirement, and its importance.[16] The principle is rooted in judicial respect for the other Branches and in a deep-seated reluctance to invalidate legislation, or parts of legislation, unless absolutely necessary. See, *e.g.*, *Edward J. DeBartolo Corp.*, 485 U.S. at 575; *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

Although the court of appeals acknowledged this principle (Pet. App. 15a), the court's analysis fails to honor it. The court agreed that, if Congress had used different language with respect to the applicability of other environmental statutes, Congress could have established Section 318, precisely as written in all other respects, as a comprehensive, one-year plan for public land manage-

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[16] See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act."); *Hooper* v. *California*, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.").

ment that would proceed regardless of those other environmental statutes. Pet. App. 14a-16a. The court nevertheless invalidated the first sentence of Section 318(b)(6)(A) as an unconstitutional intrusion on the Judiciary within the meaning of *United States* v. *Klein*, *supra*, and held that other environmental statutes apply in full to the Section 318 requirements. Pet. App. 12a-16a.

To reach that conclusion, the court of appeals read the first sentence of Section 318(b)(6)(A) to embody an "actual direction of a particular decision in a case" (Pet. App. 11a) to the courts. But this reading of Section 318 is not the most straightforward reading of the provision; it contradicts the language and structure of the provision; and it can easily be avoided to save the provision from any constitutional infirmity.

To understand the flaws in the court of appeals' interpretation, it is instructive to consider (1) the language and structure of Section 318 without regard to the first sentence of Section 318(b)(6)(A); (2) the first sentence of Section 318(b)(6)(A); and (3) the compromise nature of Section 318.

A. Section 318 Provides A Temporary Modification Of Statutory Requirements For Designated Public Lands

The most straightforward reading of Section 318 is that it provides alternative standards or plans for Forest Service and BLM timber sales in the designated areas for fiscal year 1990. When the Section is considered without regard to the first sentence of Section 318(b)(6)(A), it is plain that Congress intended to establish the procedures that would govern timber sales on a one-year basis and on specified public lands, and that Congress intended that these procedures would not be impeded or modified by the applicability of other environmental statutes.

Section 318(a) definitively sets the amount of timber sales from Forest Service and BLM lands in Oregon and

Washington. See § 318(a)(1) ("The Forest Service *shall* offer * * *.") (emphasis added); § 318(a)(2) ("The Bureau of Land Management *shall* offer * * *.") (emphasis added). Section 318(b) then establishes the guidelines for the sales—requiring minimization of fragmentation of ecologically significant old growth forest stands (§ 318(b)(1)); specifying procedures for addressing any fragmentation necessary to meet the amounts required by Section 318(a) (§ 318(b)(2)); expanding the protected areas in the Forest Service and BLM administrative plans and adopting the modified plans as statutory law (§ 318(b)(3) and (b)(5)); specifying standards for Forest Service selection of sites (§ 318(b)(4)); and providing that the "guidelines adopted by subsections (b)(3) and (b)(5) shall not be subject to judicial review by any court of the United States." § 318(b)(6)(A) (second sentence).

Additional provisions further elaborate the required procedures. Among other things, the provisions require the creation of advisory boards, which would include business and environmental representatives, for consideration of proposed timber sales (§ 318(c)); streamline the administrative appeal process with respect to individual sales (§ 318(d)); and provide for limited judicial review of individual sales (§ 318(g)).

Without regard to the first sentence of Section 318(b)(6)(A), then, Section 318 clearly can be read as establishing a temporary modification of the governing legal requirements, on a one-year basis, for specified public lands. Rather than by the panoply of existing statutes, the management of these lands would be governed by the highly specific legislation addressed to this particular problem. Section 318 orders the Forest Service and BLM to offer sales that conform to statutory guidelines set forth in subsections (b)(3) and (b)(5), and provides that those statutory guidelines are not subject to judicial review.

Indeed, even after the court of appeals initially issued its decision, the *Seattle Audubon* district court viewed

this reading of Section 318 as sufficiently plausible that it sent a letter to the court of appeals requesting clarification of the court of appeals' decision. The letter stated, in pertinent part:

> Congress appears to have intended that Section 318's standards would preempt the field as to 1990 sales. However, the question now arises whether it achieved that, in light of the Court of Appeals September 18 decision. The issue is that: Does Section 318 contain in full the substantive standards the Forest Service must meet as to 1990 sales in the forests covered by the statute? Or does [the] agency have to comply with both the requirements of Section 318 *and* any that may exist under general statutes such as the National Forest Management Act?

Br. in Opp. App. 137a-138a. The court of appeals responded by amending its decision to explain that the provisions in Section 318 "add additional requirements," and do not "repeal or amend" the other environmental statutes with respect to the Section 318-mandated procedures. See Br. in Opp. App. 138a; Pet. App. 3a-4a.

By responding in such a fashion, the court of appeals eschewed a plainly available interpretation of Section 318 that would obviate any constitutional problem—the conclusion that, as the district court put it in its letter, "Congress * * * intended that Section 318's standards would preempt the field as to 1990 sales," Br. in Opp. App. 137a, on the specified public lands. To be sure, an important aspect of the court of appeals' conclusion was its reading of the first sentence of Section 318(b)(6)(A) itself, a reading that will be addressed shortly. For present purposes, however, it is important to underscore that nothing in the rest of Section 318 precludes a conclusion that Congress intended Section 318 to establish a temporary modification of the environmental laws for the public lands at issue, and, indeed, the highly detailed, fully integrated procedures set forth in Section 318 counsel strongly in favor of that interpretation.

In considering the meaning of Section 318 without regard to the first sentence of Section 318(b)(6)(A), moreover, it must be emphasized that the court of appeals' ultimate holding—that, even if the Forest Service and BLM are in perfect compliance with Sections 318(b)(3) and (b)(5), the (b)(3) and (b)(5) guidelines may be found to violate other environmental statutes—is flatly inconsistent with the second sentence of Section 318(b)(6)(A). That sentence provides, in its entirety, that "[t]he guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States." App., *infra*, 6a. A natural reading of this provision is that it insulates the guidelines mandated by subsections (b)(3) and (b)(5) from judicial review. Under the court of appeals' view, however, subsections (b)(3) and (b)(5) simply exist in addition to all other existing statutory requirements. Thus, under the court of appeals' view, a challenge to individual timber sales may be brought on the ground that, even if the BLM and Forest Service follow subsections (b)(3) and (b)(5) to the letter, that adherence is itself inadequate—and may be rejected by federal courts—because the guidelines mandated by Section 318(b)(3) and (b)(5) are not sufficient to comply with other statutes. This is precisely the challenge that prevailed in the wake of the court of appeals' decision, and that led to the district court's enjoining 16 Forest Service sales in the *Seattle Audubon* litigation. See Br. in Opp. App. 85a-86a; *id.* at 126a-143a. The court of appeals' analysis permits judicial review of whether the actions required by Sections 318(b)(3) and (b)(5) satisfy other environmental statutes—a clear conflict with the second sentence of Section 318(b)(6)(A).[17]

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[17] The court of appeals' opinion never addresses the meaning or role of the second sentence of Section 318(b)(6)(A); it states only

Far from representing the only possible reading of Section 318, the court of appeals' conclusion—that the Section 318 specifications are simply additions to existing statutory requirements—represents a strained construction. The critical question thus becomes whether the first sentence of Section 318(b)(6)(A) compels that interpretation.

B. The First Sentence of Section 318(b)(6)(A) Does Not Direct A Court To Decide A Case

The court of appeals not only failed to appreciate the significance of the other provisions of Section 318; it also misconstrued the first sentence of Section 318(b)(6)(A) itself.

The language of Section 318(b)(6)(A) that the court of appeals held unconstitutional is:

> the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the [cases brought by the Seattle Audubon and Portland Audubon respondents].

Rather than a directive to the courts to enter judgment, it is appropriate to interpret this language, taken together with subsections (b)(3) and (b)(5), as the

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that the court "express[es] no opinion on the validity of the second and final sentence of subsection (b)(6)(A)." Pet. App. 17a n.4.

We emphasize that it is not our position that Section 318 precludes *all* judicial review of fiscal year 1990 timber sales. Section 318(g) provides that individual sales can be challenged on the ground that the sale is "arbitrary, capricious, or not in accordance with law." The category of "not in accordance with law" would include (1) claims related to compliance with Section 318 itself, and (2) statutory and constitutional claims unrelated to the adequacy of the (b)(3) and (b)(5) guidelines.

district courts did: as consistent with a temporary substitution of alternative standards for those otherwise applicable under the environmental laws. Under this reading, just as Sections 318(b)(3) and (b)(5) are substitute guidelines for the plans the agencies had developed, so too the quoted language from Section 318(b)(6)(A) can be read as a declaration that Congress is satisfied with those statutory plans and guidelines, and as a directive that the Forest Service and BLM should not attempt to make an independent evaluation of their statutory sufficiency in preparing fiscal year 1990 timber sales.

The court of appeals' contrary interpretation proceeds from a series of flawed assumptions. First, the court assumed that the first sentence of Section 318(b)(6)(A) represents an attempt "to instruct federal courts to reach a particular result in pending cases identified by caption and file number." Pet. App. 9a. The court misapprehends the meaning of the statute's reference to the particular cases. Although they are "identified by caption and file number," that identification is not in the context of a command to decide the cases. Rather, the cases are enumerated to identify certain statutes—the statutes "that are the basis" for those cases (namely, NEPA, FLPMA, OCLA, MBTA, and NFMA). The naming of the cases in the statute, although perhaps unusual, is thus not materially different from enumerating the statutes themselves, and the court of appeals incorrectly ascribed significance to the use of the case names.

Second, the court assumed that congressional enactments that affect pending litigation can be divided into a simple dichotomy—either a permissible repeal or amendment of existing legislation, or an impermissible direction of the outcome of a case. See, *e.g.*, Pet. App. 11a ("[T]he critical distinction, for purposes of deciding the limits to Congress' authority to affect pending litigation through statute, is between the actual repeal or amendment of the law underlying the litigation, which is per-

missible, and the actual direction of a particular decision in a case, without repealing or amending the law underlying the litigation, which is not permissible."). The court's dichotomy, however, fails to take into account the entire category of legislation in which Congress deems certain conditions to satisfy, or be within the reach of, pre-existing statutes.[18] This familiar category is a species

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[18] See, *e.g.*, Pub. L. No. 89-554, § 1, 80 Stat. 425 (1966) ("An employee detailed under subsection (b) of this section is deemed, for the purpose of preserving his allowances, privileges, rights, seniority, and other benefits, an employee of the agency from which detailed, and he is entitled to pay, allowances, and benefits from funds available to that agency. The authorization and payment of these allowances and other benefits from appropriations available therefor is deemed to comply with section 5536 of this title."); Pub. L. No. 92-318, § 506(m), 86 Stat. 352 (1972) ("With respect to the Virgin Islands and Guam, the enactment of this section shall be deemed to satisfy any requirement of State consent in laws or provisions of law referred to in this section."); Pub. L. No. 98-473, 98 Stat. 1954 (1984) ("*Provided* * * * That, for the purposes of section 710 of the Regional Rail Reorganization Act of 1973, as added by section 1143 of the Northeast Rail Service Act of 1981, such sum shall be considered to have been appropriated under section 713 of the Regional Rail Reorganization Act of 1973 and counted against the limitation on the total liability of the United States."); Pub. L. No. 99-662, § 204, 100 Stat. 4099 (1986) ("Any plan of improvement proposed to be implemented in accordance with this subsection shall be deemed to satisfy the requirements for obtaining the appropriate permits required under the Secretary's authority."); Pub. L. No. 100-440, § 631, 102 Stat. 1759 (1988) ("For purposes of section 1886 of the Social Security Act, Missouri Baptist Hospital of Sullivan in Sullivan, Missouri is deemed to be located in Franklin County, Missouri, retroactively effective for discharges beginning on or after December 22, 1987."); Pub. L. No. 102-624, § 1736, 104 Stat. 3793 (1990) ("The signature of the adult under this section shall be deemed sufficient to comply with any provision of Federal law requiring household members to sign the application or statements in connection with the application process.").

Indeed, at least twenty-nine statutes concerning federal land management alone specifically deem congressional specification to satisfy other environmental statutes. See Pub. L. No. 101-401, § 5(b)(2), 104 Stat. 864 (1990); Pub. L. No. 101-195, § 5(b)(2), 103 Stat. 1786 (1989); Pub. L. No. 100-547, § 202, 102 Stat. 2738 (1988);

of the use of a so-called conclusive or irrebuttable presumption, a legislative drafting device that prescribes a substantive legal rule rather than a presumption in the true sense.[19]

Indeed, the reach of the court of appeals' analysis is unclear with respect to the category of "deeming" legislation. Two alternatives are possible: either (1) this entire category is impermissible because Congress is constitutionally barred from enacting legislation that deems compliance with, or satisfaction of, other statutes, or (2) this category is permissible, but, if Congress mentions a pending case, the legislation is impermissible. Both alternatives are untenable—the first would significantly and unjustifiably constrict Congress's authority to enact substantive legislation, and the second rests on a meaningless distinction. Thus, the court of appeals' assumption of a rigid dichotomy—that, if the first sentence of Section

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Pub. L. No. 100-499, § 6(b)(2), 102 Stat. 2493 (1988); Pub. L. No. 100-184, § 6(b)(2), 101 Stat. 1276 (1987); Pub. L. No. 99-504, § 104(b), 100 Stat. 1803 (1986); Pub. L. No. 99-490, § 5(b)(2), 100 Stat. 1236 (1986); Pub. L. No. 98-586, § 5(b)(2), 98 Stat. 3107 (1984); Pub. L. No. 98-578, § 5(b)(2), 98 Stat. 3089 (1984); Pub. L. No. 98-550, § 401(b)(2), 98 Stat. 2811 (1984); Pub. L. No. 98-515, § 5(b)(2), 98 Stat. 2421 (1984); Pub. L. No. 98-514, § 5(b)(2), 98 Stat. 2417 (1984); Pub. L. No. 98-508, § 4(b), 98 Stat. 2351 (1984); Pub. L. No. 98-430, § 6(b)(2), 98 Stat. 1667-1668 (1984); Pub. L. No. 98-428, § 201(b), 98 Stat. 1659-1660 (1984); Pub. L. No. 98-425, § 111(b), 98 Stat. 1628 (1984); Pub. L. No. 98-406, § 103(b)(2), 98 Stat. 1490 (1984); Pub. L. No. 98-339, § 5(b)(2), 98 Stat. 303 (1984); Pub. L. No. 98-328, § 5(b), 98 Stat. 278 (1984); Pub. L. No. 98-324, § 5(b), 98 Stat. 265 (1984); Pub. L. No. 98-323, § 104(b), 98 Stat. 260 (1984); Pub. L. No. 98-322, § 105(b)(2), 98 Stat. 255 (1984); Pub. L. No. 98-321, § 5(b), 98 Stat. 251 (1984); Pub. L. No. 98-140, § 3(a)(2), 97 Stat. 902 (1983); Pub. L. No. 97-466, § 5(b)(2), 96 Stat. 2541 (1983); Pub. L. No. 97-407, § 5(b)(2), 96 Stat. 2034 (1983); Pub. L. No. 97-384, § 4(b)(2), 96 Stat. 1942-1943 (1983); Pub. L. No. 96-560, § 107(b)(2), 94 Stat. 3270-3271 (1980); Pub. L. No. 96-487, § 708(b)(2), 94 Stat. 2421 (1980).

[19] See *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 395 (1984) (relying on legislative deeming provision even though it is an "express legal fiction").

318(b)(6)(A) is found not to be a repeal or amendment of existing legislation, it is necessarily an impermissible direction of the outcome of a case—is erroneous.[20]

Third, the court erroneously assumed that the first sentence of subsection (b)(6)(A) directs the entry of judgments and of findings of fact. In the court's view, the pertinent sentence "directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court." Pet. App. 14a. Not so. The sentence does not, by its terms, direct the entry of any particular findings or any particular decision. Instead, the sentence is a legislative "deeming" of statutory compliance, just as in other statutes. See notes 18, 19, *supra*. To be sure, Section 318 affects the outcome of these cases in at least three ways. It eliminates the relevance of the Forest Service and BLM administrative decisions—the focus of respondents' initial challenge—to the fiscal 1990 sales (because it modifies the administrative plans and makes them statutory law); it precludes judicial review of the (b)(3) and (b)(5) guidelines (through the second sen-

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[20] It is instructive to consider the possible legislative formulations of Section 318. Under the court of appeals' analysis, it clearly would have been permissible if Congress had enacted precisely the same legislation (except the first sentence of Section 318(b)(6)(A)) and included, "Notwithstanding any other provision of law" before (b)(3) and (b)(5); in doing so, Congress would have permissibly ensured that the (b)(3) and (b)(5) guidelines would proceed unimpeded by other environmental statutes. At the same time, under the court of appeals' analysis, Congress's attempt to ensure that result by the wording it actually used was impermissible. The court does not make clear on which side of its dichotomy it would place the following two hypothetical examples: (1) Congress includes five separate provisions, to be codified in NEPA, FLPMA, MBTA, OCLA, and NFMA, specifying, "*Provided*, that the above requirements are satisfied by the guidelines in (b)(3) and (b)(5) of Section 318 of the Department of the Interior and Related Agencies Fiscal 1990 Appropriations Act," or (2) Congress simply names the five statutes in Section 318(b)(6)(A), rather than naming the cases in which they are raised. These examples highlight the artificiality of the court of appeals' rigid dichotomy.

tence of (b)(6)(A));[21] and, if the question of the sufficiency of the (b)(3) and (b)(5) guidelines is nevertheless reached, it establishes that the (b)(3) and (b)(5) guidelines are deemed in compliance with the other statutory requirements. But the legislation reaches these results through changes in the law, not through direction of the outcome of a pending case.

Further support for the conclusion that Congress was not directing the outcome of a case is provided by the first clause of the first sentence of Section 318(b)(6)(A). As noted, at the time that the legislation was enacted, respondents' challenge was to the BLM and Forest Service administrative documents. In the first phrase of the first sentence of (b)(6)(A), Congress specifies that it is not "passing on the legal and factual adequacy" of those documents. Before modifying the administrative plans and adopting them as statutory law for one year, Congress thus makes clear that the administrative documents themselves have received no congressional imprimatur, thereby leaving open the possibility of judicial challenges to those documents after the one-year period covered by Section 318.[22]

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[21] The fact that the second sentence of 318(b)(6)(A) precludes judicial review of the (b)(3) and (b)(5) guidelines demonstrates that, far from directing the decision of a case and the entry of findings, Congress is actually *disabling* courts from reaching the question whether, for fiscal 1990, the (b)(3) and (b)(5) guidelines satisfy other statutes.

[22] See also H.R. Conf. Rep. No. 264, *supra*, at 88 (Section 318 "should not be construed to moot future action after fiscal year 1990."); *id.* at 89 ("Nothing in this section is intended to prejudge * * * any future decision * * * that may be reached by a Federal court in the *Seattle Audubon/Washington Contract Loggers Assoc. v. Robertson* cases and the *Portland Audubon v. Lujan* case.").

The court of appeals believed that another sentence in the conference report provided "mixed signals" with the statement that Congress was not passing on the validity of the administrative documents. See Pet. App. 16a n.3 (quoting conference report statement that Section 318 "in no way alters application of the

Fourth, and even more fundamentally, the court of appeals incorrectly assumed that the first sentence of Section 318(b)(6)(A) must be considered a "directive from Congress *to the courts*." Pet. App. 13a (emphasis added). An equally plausible construction of the sentence —and, indeed, more plausible construction—is that the sentence is a directive to the Forest Service and BLM, confirming that, for fiscal 1990 sales, they should not engage in additional considerations beyond those specified in the (b)(3) and (b)(5) guidelines. Under this reading, the first sentence of (b)(6)(A) is directed to the agencies, and the second sentence—prohibiting judicial review of the adequacy of the (b)(3) and (b)(5) guidelines—is directed to the courts. The wording of the provision strongly supports this interpretation. In the first sentence, Congress uses the term "directs"; Congress employs a different tense of that verb in two other places in Section 318, both times with regard to executive agencies. See § 318(b)(6)(B) ("The Forest Service is *directed* * * *.") (emphasis added); § 318(h) (Forest Service, BLM, and Fish and Wildlife Service reports "shall be submitted as *directed*") (emphasis added). Without using that verb, moreover, Section 318 contains other explicit directives to executive branch agencies (*e.g.*, § 318(c)(2); § 318(f)(1)). Furthermore, the first sentence states that the (b)(3) and (b)(5) guidelines are "adequate consideration" for the purpose of meeting environmental statutes, and it is natural to read that term

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Endangered Species Act or other environmental laws to Forest Service and BLM management activities"). But there is no inconsistency. As noted, the first sentence of (b)(6)(A) operates as a deeming provision (cf. pp. 25-28 & notes 18, 19, *supra*); it provides that the (b)(3) and (b)(5) standards satisfy certain enumerated environmental statutes. There is no contradiction between such a deeming provision and the conclusion that Congress's temporary substitution of standards does not preclude further judicial challenge to the adequacy of pre-existing administrative documents.

as addressed to the agencies that would be engaged in that consideration.

Thus the court of appeals' conclusion that the first sentence of Section 318(b)(6)(A) is an impermissible directive to the judiciary—rather than a statement that Congress is satisfied that the (b)(3) and (b)(5) guidelines provide adequate protection and should be considered to occupy the field—rests on a series of erroneous assumptions.

C. The Court of Appeals' Interpretation Distorts The Congressional Compromise

In addition to misconstruing Section 318 as a whole and the first sentence of Section 318(b)(6)(A) in particular, the court of appeals' interpretation also inflicts considerable damage on Congress's carefully constructed compromise.

In Section 318, Congress was not unilaterally favoring timber interests (or the Executive Branch) and thwarting respondents. Instead, Congress took several steps to enhance environmental protection. Congress significantly modified the existing administrative plans and added new areas to protected Forest Service and BLM lands. In Sections 318(b)(1) and (b)(2), Congress required that fragmentation of ecologically significant old growth stands be minimized, and in Section 318(b)(4), it required that the Forest Service exercise discretion and assign priority in timber sale location near SOHAs "in order to retain spotted owl habitat characteristics." In a highly unsual provision, Congress, in Section 318(f), gave the Seattle Audubon respondents authority to participate in the designation of certain Forest Service lands for timber sales. See note 11, *supra*.[23] At the same time, Congress mandated total timber sales of 9.6 billion board

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[23] Congress also required that environmental groups be included on advisory boards to evaluate proposed timber sales. § 318(c).

feet,[24] and provided streamlined administrative and judicial review procedures (§ 318(d) and (g)).

In enacting Section 318, Congress clearly sought to fashion a compromise in order to avert a crisis that loomed over the Pacific Northwest. The legislative history reveals both the compromise nature of the legislation,[25] and the perceived crisis that it was intended to prevent.[26]

The court of appeals' interpretation—in which the (b)(3) and (b)(5) guidelines now simply apply *in addition to* all of the existing other requirements—radically distorts this compromise. Although Congress clearly

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[24] The court of appeals incorrectly stated the total as 7.7 billion board feet. Pet. App. 6a. That is the amount for the Forest Service, and the BLM was required to sell an additional 1.9 billion board feet. See § 318(a)(1); § 318(a)(2).

[25] See, *e.g.*, 135 Cong. Rec. H6506 (daily ed. Oct. 3, 1989) (Rep. AuCoin) ("The compromise in this appropriation addresses that mistake, that colossal policy breakdown, that has us in this dispute between those advocates of the spotted owl and those who are trying to protect the industry, and I include myself in the ranks of both."); *id.* at H6507 (Rep. Dicks) ("I can guarantee you this compromise is not pleasing everybody, but under the circumstances I think we did the best job that we could."); *id.* at H6509 (Rep. Vento) ("[T]his compromise on old growth is necessary today so that the stalemate in the Pacific Northwest is placed on the path of solution."); 135 Cong. Rec. S12,964 (daily ed. Oct. 7, 1989) (Sen. Gorton) ("[T]his amendment represents a thoughtful and balanced process.").

[26] See, *e.g.*, 135 Cong. Rec. H6506 (daily ed. Oct. 3, 1989) (Rep. AuCoin) ("[W]e are here because nothing less than the Northwest economy and the Pacific Northwest environment are at stake."); *id.* at H6509 (Rep. Vento) ("We have ended up in a quagmire of court cases and a stalemate that has resulted in severe economic and environmental problems in the Pacific Northwest."); 135 Cong. Rec. S12,961 (daily ed. Oct. 7, 1989) (Sen. Adams) ("Small towns have disappeared. Others are in desperate straits. * * * [T]he severity of the crisis this year did not give us the luxury of time to slowly mull over this issue. Mills were shutting down. Jobs were threatened and gone. Our State was being torn apart, and tensions were rising with the very real potential of violence.").

sought to streamline the administrative and judicial process through its statutory plan, the court of appeals' interpretation has the effect not of providing a comprehensive plan (as Congress plainly intended), but rather, ironically, of *adding* further to the existing patchwork of statutory requirements. Neither the language nor the structure of Section 318 compels this result, and the canon of construing statutes in favor of their constitutionality points strongly in the other direction. Rather than an intrusive command to the judiciary, Section 318 should properly be construed as a one-year, comprehensive plan for managing designated public lands—an objective that the court of appeals itself concluded could have been achieved through other language. Pet. App. 12a-16a.[27]

II. SECTION 318 CONTAINS NO VIOLATION OF ARTICLE III

In addition to its error of statutory construction, the court of appeals' constitutional analysis was severely flawed. The court failed to recognize that Article III plays a limited role in addressing the issue of the effect

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[27] The court of appeals stated that it could not interpret Section 318 as a temporary modification of the environmental laws because Congress cannot impliedly repeal statutes in appropriations Acts. Pet. App. 16a. In so ruling, it claimed to follow this Court's decision in *TVA* v. *Hill*, 437 U.S. 153 (1978). In *Hill*, however, the Court invoked the strong presumption against "repeal by implication" in circumstances where no statutory language whatsoever exempted the federal project from the requirements of the Endangered Species Act; only legislative history called for that result. The Court's opinion leaves no room for doubt that it would have sustained the exemption *if* it could be found in the text enacted into law. 437 U.S. at 189-191, 193. Thus, the court of appeals' invocation of *Hill* is erroneous. It is settled that Congress can enact substantive law, and modify statutory provisions, in appropriations legislation. See, *e.g.*, *United States* v. *Will*, 449 U.S. 200, 222 (1980); *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940). See also *Metro Broadcasting, Inc.* v. *FCC*, 110 S. Ct. 2997, 3016 n.29 (1990).

of legislative enactments on pending cases, that Article III is not violated by the first sentence of Section 318 (b)(6)(A), and that *United States* v. *Klein* does not require a contrary conclusion.

A. Article III Plays A Limited Role In the Constitutional Constraints On Congress's Ability To Affect Pending Cases

The court of appeals viewed the issue of Congress's ability to affect pending cases as a broad question of Article III jurisprudence. See Pet. App. 9a-15a. In fact, however, numerous constitutional constraints restrict Congress's ability to affect pending cases, and Article III plays a limited role within that structure.

It is well established that Congress may enact a statute that changes the law and thereby affects pending cases. As Chief Justice Marshall explained in the seminal case of *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801):

> It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of an appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation.

Although there has been disagreement regarding the appropriate canon of interpretation to determine whether Congress intended retroactivity,[28] it is beyond dispute that Congress may constitutionally specify that its enactments changing substantive law are to be applied retroactively.

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[28] See *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 110 S. Ct. 1570, 1576-1578 (1990); *id.* at 1579-1585 (Scalia, J., concurring); *id.* at 1591-1594 (White, J., dissenting).

See *United States* v. *Sperry Corp.*, 110 S. Ct. 387, 396 (1989); *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 728-731 (1984); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976).

Various constitutional provisions restrict this legislative ability to change the law and affect pending cases. The Due Process Clause requires a rational legislative purpose for the retroactive application of new legislation.[29] The equal protection component of the Due Process Clause prohibits invidious or arbitrary discrimination.[30] The Takings Clause requires just compensation for a taking of property.[31] The Ex Post Facto Clause provides that Congress may not enact a law that imposes punishment retroactively,[32] and the Bill of Attainder Clause provides that Congress may not legislatively determine guilt and inflict punishment upon an identifiable individual without the protection of a judicial trial.[33]

Those provisions provide a structured and well-defined inquiry into Congress's ability to affect pending litigation. The role of Article III is not as a back-up for those specific provisions, addressing the same subject a second time if no violation of the directly pertinent provision has been found. When these provisions speak to a particular issue, Article III should not be invoked in an attempt to provide a different answer to the same inquiry.[34]

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[29] *E.g.*, *United States* v. *Sperry Corp.*, 110 S. Ct. at 396; *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. at 728-731; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 14-20.

[30] *E.g.*, *Lyng* v. *Castillo*, 477 U.S. 635 (1986); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

[31] *E.g.*, *Bowen* v. *Gilliard*, 483 U.S. 587, 603-609 (1987).

[32] *E.g.*, *Miller* v. *Florida*, 482 U.S. 421 (1987); *Weaver* v. *Graham*, 450 U.S. 24 (1981).

[33] *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977).

[34] Cf. *Graham* v. *Connor*, 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of con-

Article III nevertheless has an important role to play in determining Congress's ability to affect pending litigation. Article III, by vesting the "judicial Power" in the judiciary (Art. III, §§ 1, 2), protects against invasion of the adjudicative function. One example of such an invasion would be a congressional specification of a finding of fact from the record in a particular case or controversy; it would *not* prohibit, however, a congressional specification of the significance, or legal characterization of, a finding of fact.[35] Another example would be a provision that the judiciary must reach a decision in violation of the Constitution. Cf. *Yakus* v. *United States*, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) (requiring courts to "enforce unconstitutional laws or statutes" would violate "the constitutional integrity of the judicial process").

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stitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."); *Whitley* v. *Albers*, 475 U.S. 312, 327 (1986) ("[T]he Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners * * * where the deliberate use of force is challenged as excessive and unjustified.").

[35] An example may illustrate the difference between these two possible congressional actions. Suppose that Congress passes a statute requiring means testing for Social Security benefits and prohibiting benefits for "citizens who are self-sufficient"; Congress then amends the statute to provide that, "Any individual found to possess a yacht shall be deemed to be self-sufficient for purposes of the Social Security Act, and this provision shall apply to all pending cases." Because Congress is changing the legal characterization and significance of a fact—yacht ownership—no Article III problem is presented. If Congress, however, enacted legislation providing that, "In the case of *George Jones* v. *Secretary of Health & Human Services*, the court shall find that George Jones owns a yacht," a serious Article III problem would be presented because Congress, by specifying a factual finding from the evidentiary record in a particular case, would be invading the court's adjudicative function.

Article III thus should not be interpreted to substitute for the coverage of other constitutional provisions and to undermine the structured analysis provided by those provisions; Article III does stand, however, as a prohibition against congressional invasion of the adjudicative function itself.

B. The First Sentence of Section 318(b)(6)(A) Does Not Violate Article III

Respondents do not contend that the first sentence of Section 318(b)(6)(A) violates due process or equal protection, nor do they contend that it constitutes a taking of property, a bill of attainder, or an ex post facto law. Clearly, any such claim by respondents would be unavailing. The provision is not irrational, arbitrary, or invidious, it takes no property, and it is not punitive. Respondents have no vested rights of any kind, and the provision relates solely to the prospective management of federal lands.

Respondents nevertheless contend—and the court of appeals concluded—that the first sentence of Section 318(b)(6)(A) violates Article III. But the first sentence of Section 318(b)(6)(A) presents no invasion of the adjudicative function. As has been discussed, Congress was enacting legislation to provide standards for the management of designated public lands in a particular fiscal year. That Congress chose to employ a deeming provision, or conclusive presumption, does not undermine the provision's validity, nor does it alter the fact that the disputed sentence represents, at most, a determination about the governing legal standard, rather than the "factual finding[]" perceived by the court of appeals (see Pet. App. 14a).

Deeming provisions, or other conclusive presumptions, are not inherently impermissible, and do not violate Article III. See, *e.g.*, *United States* v. *Locke*, 471 U.S. 84, 98-100 (1985) (giving effect to conclusive presumption in public lands case). To be sure, conclusive presump-

tions are subject to constitutional challenge as violations of due process. See, *e.g.*, *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 644-646 (1974); *Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972). But the conclusive presumption at issue in this case concerns the legal standards governing the management and disposition of certain government timber and forest lands for fiscal year 1990. Respondents have offered no constitutional challenge to the permissibility or reasonableness of the presumption itself, and, in fact, they have no liberty or property interest protectable under the Due Process Clause which would limit Congress's use of a conclusive presumption in defining compliance with such enactments.

The court of appeals' acknowledgment that Congress could have reached essentially the same result through different language is especially telling. Congress is not required to legislate with razor-sharp precision, and courts do not sit as editorial critics of legislative draftsmanship. So long as Congress's intent was clear through the statutory language (*i.e.*, its intent that the specified plan should proceed unimpeded by the applicability of other environmental statutes) and so long as that congressional goal itself violated no constitutional prohibition, the court had no warrant for blacklining the first sentence of Section 318(b)(6)(A) and eliminating it from the statute. So long as the expressed statutory objective is permissible, Congress is not required to engage in circumlocutions, or specialized terms of art, to achieve it.[36]

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[36] See, *e.g.*, *United States* v. *Ptasynski*, 462 U.S. 74, 86 (1983) ("Had Congress described this class of oil in nongeographic terms, there would be no question as to the Act's constitutionality. We cannot say that identifying the class in terms of its geographic boundaries renders the exception invalid. Where, as here, Congress has exercised its considered judgment with respect to an enormously complex problem, we are reluctant to disturb its determination."); *Pope* v. *United States*, 323 U.S. 1, 9 (1944) (rejecting claim that statute violated Article III, even though it was "inartistically drawn," because the permissible "purpose and effect" of the provi-

The court's misguided constitutional analysis is particularly egregious because the subject of the legislation was a prospective prescription for the management of public lands. The Constitution plainly assigns this responsibility to Congress. Art. IV, § 3, Cl. 2. Congress's authority with respect to the public lands is plenary. See, *e.g.*, *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 580 (1987); *Kleppe* v. *New Mexico*, 426 U.S. 529, 539 (1976); *United States* v. *City and County of San Francisco*, 310 U.S. 16, 29-30 (1940). The courts enter this field only by authority of the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, or other statutes granting judicial review of agency action. The courts have no independent authority over the disposition of public property. *Light* v. *United States*, 220 U.S. 523, 537 (1911). By invalidating the first sentence of Section 318(b)(6)(A) and upsetting Congress's carefully considered plan for the management of these designated public lands, the court trenched on Congress's broad authority with respect to the public lands. As a consequence, it can fairly be stated that the separation of powers violation in this case is not, as the Ninth Circuit would have it, a congressional invasion of the judicial domain, but a judicial invasion of the congressional domain.

C. *United States* v. *Klein* Does Not Require A Conclusion That The First Sentence Of Section 318(b)(6)(A) Is Unconstitutional

The court of appeals relied extensively on *United States* v. *Klein* for its conclusion that the first sentence of Sec-

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sion were discernible); *In re Penn Central Transportation Co.*, 384 F. Supp. 895, 916 (Regional Rail Reorg. Ct. 1974) (Friendly, J.) ("[I]f Congress had worded the statute in either of the forms discussed, the commerce power would have permitted it, despite the uniformity clause * * *. Since what Congress did was not in violation of the Constitution, we decline to hold its action to have constituted a breach of the uniformity clause simply because it used words readily intelligible to its members and the public rather than circumlocutions that would have had exactly the same effect.").

tion 318(b)(6)(A) must be invalidated, and that the guidelines in (b)(3) and (b)(5) must be measured against other environmental statutes. In addition to its misinterpretation of Section 318, however, the court gave a substantially overbroad meaning to this Court's decision in *Klein*.

1. During the Civil War, Congress enacted the Abandoned Property Collection Act, ch. 120, 12 Stat. 820 (1863). The legislation authorized military authorities to seize and sell property found "in insurrectionary districts within the United States" and deposit the proceeds into the Treasury. 12 Stat. 820. The Act further provided that a former owner of such property could sue in the Court of Claims and obtain the net proceeds on proof of his former ownership, his right to the proceeds, and the fact that "he ha[d] never given any aid or comfort to the present rebellion." § 3, 12 Stat. 821. Also in 1863, President Lincoln issued a proclamation offering that, if persons who had participated in the rebellion (with some exceptions) would take an oath of allegiance, they would receive "a full pardon * * * with restoration of all rights of property." Proclamation No. 11, 13 Stat. 737 (1863).

In the wake of Grant's capture of Vicksburg, Union officers seized the cotton of Victor F. Wilson from his warehouse, sold it, and deposited the net proceeds of more than $125,000 in the United States Treasury. In February 1864, Wilson took the necessary oath and received a presidential pardon. Wilson died shortly thereafter, and, in 1865, Klein, the administrator of Wilson's estate, filed a petition to collect the proceeds from the sale of Wilson's cotton. The Court of Claims ultimately determined that the estate was entitled to recover the proceeds. *Kline* v. *United States (Wilson's Case)*, 4 Ct. Cl. 559, modified, 7 Ct. Cl. vii (1869). See generally Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States *v.* Klein *Revisited*, 1981 Wis. L. Rev. 1189,

1192-1193, 1197-1201; *Klein*, 80 U.S. (13 Wall.) at 130-132.

This Court subsequently held that receipt of a Presidential pardon established conclusive proof of loyalty and entitled the recipient to return of his property. *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1870). In the wake of the *Padelford* decision (and while the government's appeal to this Court from the Court of Claims judgment in Klein's case remained pending), Congress enacted a statute providing that no presidential pardon should be admissible as proof of loyalty; that acceptance, without written protest or disclaimer, of a pardon reciting that the claimant took part in or supported the rebellion in fact should be conclusive evidence of the claimant's disloyalty; and that the Court of Claims and the Supreme Court must dismiss for want of jurisdiction any pending claims based on a Presidential pardon. Act of July 12, 1870, ch. 251, 16 Stat. 235; see *Klein*, 80 U.S. (13 Wall.) at 132-134, 143-144.

Accordingly, the United States asked this Court to dismiss the case with a mandate to the Court of Claims directing that it also dismiss the claim. Young, *supra*, 1981 Wis. L. Rev. at 1210 & n.113. This Court denied the motion to dismiss and affirmed the Court of Claims' judgment for Wilson's estate; in doing so, it declared the 1870 provision unconstitutional. *United States* v. *Klein*, *supra*.

The Court first noted that, by the terms of the pardon, property owners retained a continuing interest in their property after receipt of a pardon. "The restoration of the proceeds became the absolute right of the persons pardoned, on application within two years from the close of the war. It was, in fact, promised for an equivalent." 80 U.S. (13 Wall.) at 142. The Court then considered whether the Act of 1870 created a permissible exception to the appellate jurisdiction of the Supreme Court.[37]

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[37] Three years previously, this Court had upheld such an exception to the Court's appellate jurisdiction in *Ex parte McCardle*,

The Court rejected that proposition on the ground that the legislation "does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have." 80 U.S. (13 Wall.) at 145. The Court observed that "the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. * * * The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by denying the bill. * * * [T]he court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary." *Id.* at 146-147.

The Court further concluded that the congressional enactment violated the President's authority over pardons:

> The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.
>
> * * * To the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences. It may be granted on conditions. In these particular pardons, * * * restoration of property was expressly pledged, and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath.

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74 U.S. (7 Wall.) 506 (1869). The congressional debates on the 1870 legislation included reference to *McCardle*—and an apparent attempt to shape the legislation to conform to it—as Congress fashioned its response to the *Padelford* decision. See generally 6 C. Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-68*, at 842 (1971); Cong. Globe, 41st Cong., 2d Sess. 3814-3825 (1870). See also Young, *supra*, 1981 Wis. L. Rev. at 1201-1209.

> Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration.

80 U.S. (13 Wall.) at 147-148.

2. Several important distinctions between *Klein* and the case at hand are immediately apparent. The underlying question in *Klein* was the right to previously vested property; the underlying question in this case is prospective rules for the management of public lands for one year. *Klein* involved an exception to the appellate jurisdiction of this Court; this case involves no such question.[38] *Klein* involved an attempt to manipulate the subject matter jurisdiction of the courts in order to reach an unconstitutional result (infringement on the Executive's pardon power); this case involves no such unconstitutional result (and, indeed, it is conceded that Congress could have reached essentially the same result through different language).

The court of appeals nevertheless concluded that *Klein* requires invalidation of the first sentence of Section 318 (b)(6)(A). This interpretation is an overreading of *Klein*. To be sure, the *Klein* decision "is not a model of clarity."[39] In accordance with the settled principle that this Court does not "formulate a rule of constitutional law broader than is required by the precise facts to which it is applied," *Liverpool, New York & Philadelphia S.S.*

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[38] As we have pointed out, the second sentence of Section 318 (b)(6)(A) precludes judicial review of the (b)(3) and (b)(5) guidelines, but Section 318 permits judicial review of other statutory and constitutional claims, including compliance with Section 318 itself. See note 17, *supra*; § 318(g).

[39] P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 369 (3d ed. 1988). See also Eisenberg, *Congressional Authority To Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498, 526 (1974) ("The rationale underlying *Klein* is not clear.").

Co. v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885), however, the decision in *Klein* should not be given an unnecessarily broad construction.

In our view, three propositions are indisputably established by *Klein*, and are sufficient to sustain its holding. First, Congress may not impinge upon the Executive's pardon authority.[40] Second, congressional limitations on this Court's jurisdiction may, in certain circumstances, be subject to judicial review.[41] Third, Congress may not manipulate the appellate jurisdiction of this Court in such a manner that the Court becomes the means through which Congress unconstitutionally infringes on the pardon power.

A broader reading of *Klein* is both unnecessary and problematic. For example, although the opinion could be read expansively to suggest that Congress may never establish "rules of decision in * * * cases pending before [the judiciary]," 80 U.S. (13 Wall.) at 146, such an interpretation would undermine the basic principle of *The Schooner Peggy* and the permissibility of retroactive application of legislation.[42] Similarly, although *Klein* contains language which may be read as suggesting that the government cannot be favored by the retroactive applica-

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[40] This Court has consistently interpreted *Klein* as standing for that proposition, at least in part. See *Carlisle* v. *United States*, 83 U.S. (16 Wall.) 147, 152-153 (1873); *Hart* v. *United States*, 118 U.S. 62, 66-67 (1886); *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 404-405 (1980). See also *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring in the judgment).

[41] See *Klein*, 80 U.S. (13 Wall.) at 145-146.

[42] See P. Bator *et al.*, *supra*, at 369 n.4 (*Klein* "should surely not be read as casting doubt on the ancient principle, clear since the decision in United States v. Schooner Peggy * * * that the courts are obligated to apply law (otherwise valid) as they find it at the time of their decision, including when a case is on review, the time of the appellate judgment."); *National Juvenile Law Center, Inc.* v. *Regnery*, 738 F.2d 455, 465 (D.C. Cir. 1984).

tion of legislation to pending litigation, see 80 U.S. (13 Wall.) at 146, Congress clearly has authority to enact retroactive legislation that favors the government, subject to various limitations.[43] *Klein* thus need not, and should not, be given an unduly broad reading.[44]

In this case, Congress specified the standards to govern the management of public lands, and acted well within its authority under the Property Clause. Nothing in *Klein*, or in Article III itself, precluded Congress from making such a determination, and the court of appeals erroneously invalidated that congressional enactment.

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[43] See, *e.g.*, *United States* v. *Sperry Corp.*, *supra*; *United States* v. *Heinszen & Co.*, 206 U.S. 370 (1907) (upholding legislation which provides retroactive ratification of previously unauthorized tariffs and which therefore requires dismissal of pending cases); *Rafferty* v. *Smith, Bell & Co.*, 257 U.S. 226 (1921) (retroactive ratification of previously unauthorized tax applies to cases pending before this Court); *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 415, 426-430 (1931).

[44] Although this Court has noted *Klein*'s language concerning a "rule of decision" in a pending case, it has not subsequently invalidated a statute on that ground. See *Sioux Nation of Indians*, 448 U.S. at 390-407 (holding that, in challenged statute, Congress permissibly waived res judicata defense); *Pope* v. *United States*, 323 U.S. at 13 (holding that challenged statute left courts with a "judicial function[]"). See also *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568 (1962) (plurality opinion).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, 103 Stat. 745-750 (1989), provides:

> (a) From funds appropriated under this Act or otherwise made available—
>
> > (1) The Forest Service shall offer, notwithstanding the provisions of the Federal Timber Contract Payment Modification Act of 1984 (16 U.S.C. 618(a)(5)(C)), an aggregate timber sale level of seven billion seven hundred million board feet of net merchantable timber from the national forests of Oregon and Washington for fiscal years 1989 and 1990. Such timber sales shall be consistent with existing land and resource management plans or land and resource management plans as approved except, in the case of the Mapleton Ranger District of the Siuslaw National Forest, Oregon, such sales shall be consistent with the preferred alternative of the draft land and resource management plan and accompanying draft environmental impact statement dated October 1, 1986, pending approval of a final land and resource management plan for the Siuslaw National Forest: *Provided*, That of the seven billion seven hundred million board foot aggregate timber sale level for fiscal years 1989 and 1990, timber sales offered from the thirteen national forests in Oregon and Washington

known to contain northern spotted owls shall meet an aggregate timber sale level for fiscal years 1989 and 1990 of five billion eight hundred million board feet of net merchantable timber: *Provided further*, That the sales volume shall be distributed in the same proportion between Oregon and Washington national forests known to contain northern spotted owls based on the average sale volume for fiscal years 1986 through 1988.

(2) The Bureau of Land Management shall offer such volumes as are required in fiscal year 1990 to meet an aggregate timber sale level of one billion nine hundred million board feet for fiscal years 1989 and 1990 from its administrative districts in western Oregon.

(b)(1) In accordance with subsection (b)(2) of this section, all timber sales from the thirteen national forests in Oregon and Washington known to contain northern spotted owls prepared or offered pursuant to this section shall minimize fragmentation of the most ecologically significant old growth forest stands. "Old growth forest stands" are defined as those stands meeting the criteria according to Forest Service Research Publication Numbered PNW-447. In those instances where the Forest Service, after consultation with the advisory boards established pursuant to subsection (c) of this section, determines that the definition in Forest Service Research Publication Numbered PNW-447 is not fully applicable in national forests known to contain northern spotted owls, the Forest Service shall

use old-growth definitions contained in its Pacific Northwest Regional Guide.

(2) To the extent that fragmentation of ecologically significant old growth forest stands is necessary to meet the timber sale levels directed by subsection (a)(1) of this section, the Forest Service shall minimize such fragmentation in the ecologically significant old growth forest stands on a national forest-by-national forest basis based on the Forest Service's discretion in determining the ecologically significant stands after considering input from the advisory boards created pursuant to subsection (c) of this section. The habitat of nesting pairs of spotted owls which are not in the Spotted Owl Habitat Areas (SOHAs) described in subsection (b)(3) of this section shall be considered an important factor in the identification of ecologically significant old growth forest stands.

(3) No timber sales offered pursuant to this section from the thirteen national forests in Oregon and Washington known to contain northern spotted owls may occur within SOHAs identified pursuant to the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 as adjusted by this subsection:

(A) For the Olympic Peninsula Province, which includes the Olympic National Forest, SOHA size is to be 3,200 acres;

(B) For the Washington Cascades Province, which includes the Mt. Baker-Snoqualmie, Okanogan, Wenatchee, and

Gifford-Pinchot National Forests, SOHA size is to be 2,600 acres;

(C) For the Oregon Cascades Province, which includes the Mt. Hood, Willamette, Rogue River, Deschutes, Winema, and Umpqua National Forests, SOHA size is to be 1,875 acres;

(D) For the Oregon Coast Range Province, which includes the Siuslaw National Forest, SOHA size is to be 2,500 acres; and

(E) For the Klamath Mountain Province, which includes the Siskiyou National Forest, SOHA size is to be 1,250 acres.

(F) All other standards and guidelines contained in the Chief's Record of Decision are adopted.

(4) In planning for the preparation and offer of timber sales authorized in subsection (a)(1) of this section, the Forest Service, to the extent possible in areas proximate to SOHA sites identified in subsection (b)(3) of this section, should exercise discretion in selecting sites and/or silvicultural prescriptions in order to retain spotted owl habitat characteristics in such areas. The Forest Service should consider the relative location and quality of such areas contiguous to the SOHAs and should give higher priority to preparing and offering sales in areas of lower quality and less important location than to areas of greater quality and more important location relative to the SOHAs.

(5) No timber sales offered pursuant to this section on Bureau of Land Management lands in western Oregon known to contain northern spotted owls shall occur within the 110 areas

identified in the December 22, 1987 agreement, except sales identified in said agreement, between the Bureau of Land Management and the Oregon Department of Fish and Wildlife. Not later than thirty days after enactment of this Act, the Bureau of Land Management, after consulting with the Oregon Department of Fish and Wildlife and the United States Fish and Wildlife Service to identify high priority spotted owl area sites, shall select an additional twelve spotted owl habitat areas. No timber sales may be offered in the areas identified pursuant to this subsection during fiscal year 1990.

(6)(A) Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc., et al. v. F. Dale Robertson, Civil No.

89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.

(B) The Forest Service is directed to review and revise as appropriate the decision adopted in the December 1988 Record of Decision referenced in subsection (b)(6)(A) of this section and shall consider any new information gathered subsequent to the issuance of the Record of Decision, including the interagency guidelines for conservation of northern spotted owls developed by the Interagency Scientific Committee to address conservation of the northern spotted owl. This review, and any resulting changes to the December 1988 decision determined to be necessary by the Forest Service are to be completed and in effect not later than September 30, 1990.

(c)(1) The Secretaries of Agriculture and the Interior shall name advisory boards on a national forest-by-national forest and Bureau of Land Management district-by-district basis which shall be comprised of not more than seven individuals who, in the appropriate Secretary's judgment, represent a diversity of views. In the process of selecting individuals to serve on the advisory boards, the Secretaries shall make every effort to recognize the diversity of views and perspectives and allow parties which represent a cross-section of those views to participate in making recommendations in the selection of board members, provided, that every effort will be made to ensure the advisory boards are comprised of an

equal number of representatives of environmental and business concerns. The advisory boards shall be named not later than thirty days after enactment of this Act. The advisory boards shall provide recommendations to the Forest Service and the Bureau of Land Management in reviewing prospective timber sales which shall meet the timber sale levels directed by this section prior to their offer. The advisory boards shall present their advice within fifteen or forty-five days after receipt of the necessary review documents. The fifteen-day period applies to single sales and the forty-five-day period applies to multiple sales. The members of the advisory boards authorized by this section shall serve without compensation or reimbursement of expenses. The Forest Service and the Bureau of Land Management are authorized to use available funds for the services of professional, independent facilitators to assist in the work of the advisory boards.

(2) The Forest Service and Bureau of Land Management shall consider the recommendations of the advisory boards once such boards are established pursuant to this section, including any suggested modifications of individual sales. The Forest Service and Bureau of Land Management shall also consider recommendations made by the United States Fish and Wildlife Service on those timber sales conferred upon under section 7(a)(4) or, if the spotted owl is listed as a threatened or endangered species, consult under section 7(a)(2) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1536(a)(2) and (a)(4)) prior to the offer of any subsequent timber sale

in fiscal year 1990. These recommendations shall be considered regardless of whether the agreement provided in subsection (f)(1) of this section has been reached, entered into, and accepted by the relevant court. Adoption or rejection of such recommended modifications shall not require preparation of additional environmental documents, notwithstanding any other provision of law.

(d) Notwithstanding any other provision of law, there shall be not more than one level of administrative appeal of any decision by the Forest Service or the Bureau of Land Management to undertake any activity directed by this section for timber sales to be prepared, advertised, offered, and awarded during fiscal year 1990 from the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls. If an administrative stay is granted in any such appeal the Regional Forester or the Interior Board of Land Appeals shall issue a final decision on the merits within forty-five days of the date of issuance of such stay. Notwithstanding any other provision of law, any party seeking to challenge a decision made after the date of enactment of this Act to prepare, advertise, offer, or award a timber sale in fiscal year 1990 from the thirteen national forests and Bureau of Land Management lands in western Oregon known to contain northern spotted owls need not exhaust their administrative remedies prior to filing suit. Nothing in this subsection shall alter the administrative appeal requirements of the Forest Service or Bureau of Land Management.

(e) Nothing in this section shall affect interagency cooperation among the Forest Service, the Bureau of Land Management, and the United States Fish and Wildlife Service under sections 7(a)(2) and 7(a)(4) of the Endangered Species Act and its regulations.

(f)(1) Not later than two days after enactment of this Act, the Forest Service shall submit to plaintiffs in the captioned case Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160, a list of sales which had been prepared for offer in fiscal year 1989 and which contain at least 40 acres of suitable spotted owl habitat. Not later than fourteen days after receipt of such list, plaintiffs to the suit referenced in this subsection may enter into an agreement with the Forest Service releasing for sale not less than one billion one hundred million board feet of net merchantable timber. Such sales must be available for advertisement not later than fourteen days after the agreement required by this subsection is reached. Such timber sales selected shall not be subject to further judicial review by any court of the United States.

(2) If the agreement specified in subsection (f)(1) of this section is reached, then those timber sales described in the list submitted to plaintiffs pursuant to subsection (f)(1) of this section but not contained in the agreement authorized by subsection (f)(1) of this section shall not be offered for sale in fiscal year 1990.

(3) If the agreement authorized under subsection (f)(1) of this section is not implemented within the timeframes prescribed in subsection (f)(1) of this section, one billion one hundred

million board feet of net merchantable timber from such sales submitted to plaintiffs pursuant to subsection (f)(1) of this section shall be selected and modified as appropriate by the Forest Service in accordance with the provisions of this section. Selected sales shall be prepared, advertised, offered, awarded and operated notwithstanding any provision of law that is a basis for any stay, injunction or order issued in the proceeding identified in subsection (f)(1) of this section: *Provided*, That nothing in this subsection shall affect rights available under the Contract Disputes Act (41 U.S.C. 601 et seq.).

(4) The Forest Service shall, for each respective timber sale, lift its own stay or apply to the appropriate court for the lifting of the restraining order or injunction whose basis has been withdrawn by this section.

(5) Timber sales selection pursuant to subsections (f)(1) or (f)(3) of this section shall be based on the following criteria: (1) proportional distribution between Oregon and Washington national forests known to contain northern spotted owls based on the average sale volumes for fiscal years 1986 through 1988; (2) proportional distribution to the extent possible among the thirteen national forests known to contain northern spotted owls in Oregon and Washington based on the average sale volumes for fiscal years 1986 through 1988; and (3) to the extent possible, selection of sales outside the habitat of nesting pairs of spotted owls which are not in the Spotted Owl Habitat Areas described in subsection (b)(3) of this section.

(g)(1) No restraining order or preliminary injunction shall be issued by any court of the

United States with respect to any decision to prepare, advertise, offer, award, or operate a timber sale or timber sales in fiscal year 1990 from the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls. The provisions of section 705 of title 5, United States Code, shall not apply to any challenge to such a timber sale: *Provided*, That the courts shall have authority to enjoin permanently, order modification of, or void an individual sale if it has been determined by a trial on the merits that the decision to prepare, advertise, offer, award, or operate such sale was arbitrary, capricious or otherwise not in accordance with law: *Provided further*, That any challenge to a timber sale must be filed in Federal District Court within fifteen days of the date of initial advertisement of the challenged timber sale: *Provided further*, That for forty-five days after the date of filing of a challenge to a timber sale the affected agency shall take no action to award a challenged timber sale. Civil actions filed under this section shall be assigned for hearing at the earliest possible date and shall take precedence over all other matters pending on the docket of the court at that time except for criminal cases: *Provided further*, That the court shall render its final decision relative to any challenge within forty-five days from the date such challenge is brought, unless the court determines that a longer period of time is required to satisfy the requirements of the United States Constitution.

(2) Notwithstanding any other provision of law, the court may set rules governing the pro-

cedures of any such proceeding which set page limits on briefs and time limits on filing briefs and motions and other actions which are shorter than the limits specified in the Federal rules of civil or appellate procedure.

(3) In order to reach a decision within forty-five days, the Federal District Court may assign all or part of any such case or cases to one or more Special Masters, for prompt review and recommendations to the court.

(h) The Forest Service, the Bureau of Land Management, and the United States Fish and Wildlife Service shall submit reports updating their findings and progress as determined by the process recognized under subsection (e) of this section on a monthly basis to the President of the Senate and the Speaker of the House of Representatives for appropriate referral. Such reports shall also include information on the extent to which recommendations of the advisory boards established pursuant to subsection (c) of this section were integrated into timber sale decisions as well as reasons for modifying or not adopting recommendations made by the advisory boards. Such reports shall be submitted as directed beginning on December 1, 1989, and ending on September 30, 1990.

(i) Except for provisions of subsection (a)(1) of this section, the provisions of this section apply solely to the thirteen national forests in Oregon and Washington and Bureau of Land Management districts in western Oregon known to contain northern spotted owls. Nothing contained in this section shall be construed to require the Forest Service or Bureau of Land Man-

agement to develop similar policies on any other forest or district in Oregon or Washington.

(j) The advisory boards established under this section shall not be subject to the Federal Advisory Committee Act (86 Stat. 770).

(k) Timber sales offered to meet the requirements of subsection (a) of this section shall be subject to the terms and conditions of this section for the duration of those sale contracts. All other provisions of this section shall remain in effect until September 30, 1990.

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